

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

In Re: In the Matter of Extradition of Almaz Nezirovic	7:12-mc-00039
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PROCEEDINGS HELD BEFORE
THE HONORABLE ROBERT S. BALLOU, JUDGE

November 19, 2012
10:10 a.m. to 11:30 a.m.
Lynchburg, Virginia
Pretrial Motions Hearing
Interpreter: Emese Purger Kedmen

Appearances:

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1 (November 19, 2012, 10:10 a.m.)

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P R O C E E D I N G S

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THE COURT: I want to thank you, first of all, for relocating over here for this morning when we had some facility difficulties. Let's go ahead and call the case.

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MS. CLERK: In re: The Matter of
Extradition of Almaz Nezirovic, miscellaneous number
7:12-mc-39.

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THE COURT: All right. The record reflects the Government is present with its counsel. Mr. Nezirovic is also present with his counsel. Madam Interpreter, have you been sworn?

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MS. INTERPRETER: Yes, sir.

THE COURT: Very well. I have on our calendar for oral argument today on -- we have all the evidence in. I read the transcript and all of your briefs. So we'll hear any argument the Government has to offer. Mr. Heaphy.

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MR. HEAPHY: Thank you, Your Honor, and good morning again. We are here for final argument on the extradition petition. I will not spend much time going through the procedural rules that govern the hearing.

1 We carefully briefed that. I don't think there is a lot
2 of dispute. Honestly, Your Honor, this is part of a
3 larger conduct of foreign affairs, and our role as the
4 United States attorney is limited, as is the Court's
5 role. It's really a limited inquiry to make certain
6 findings whether there is a valid treaty, whether this
7 is the person wanted by the foreign government and
8 whether there's probable cause that we accept the
9 information presented by the Bosnians as correct. The
10 rulings are liberally construed to facilitate the
11 request of the foreign government. Constitutional
12 rights, obviously, do not apply.

13 THE COURT: I think we get down to really
14 there is just a couple of issues. I mean, while I'm not
15 going to take any defenses away from Mr. Nezirovic, the
16 treaty is not at issue, Mr. Nezirovic's identity is not
17 at issue, whether he is the right person, whether there
18 is probable cause, it's really a statute of limitations
19 question. Maybe somewhat of an ex post facto issue and
20 political offense exception are the primary things I see
21 out there.

22 MR. HEAPHY: Your Honor, I think that's
23 exactly right. The Court has to make six separate
24 findings. I think really only one of them, and that's
25 the crimes covered by the treaty, is at stake. We don't

1 have an issue here of authority (unintelligible)
2 judicial office of the proceeding, jurisdiction over
3 fugitive is established as to his identity, the treaty
4 being in full force and effect, even the probable cause.
5 I think it really comes down to that final requirement;
6 which is, whether or not the crimes that for which the
7 extradition is sought is covered by the treaty.

8 THE COURT: Right.

9 MR. HEAPHY: So let me, Your Honor, I will
10 skip any preliminaries and go straight to those two
11 issues.

12 The first that you mentioned was the statute
13 of limitations. The treaty in Article 7 provides an
14 extradition shall not be granted if, legal proceedings
15 or the enforcement of the penalty for the act committed
16 by the person claimed has become barred by limitation,
17 according to the laws of the country to which
18 requisition is addressed.

19 That means United States law applies when
20 determined whether or not there has been a statute of
21 limitations violation. The courts that have interpreted
22 that, Your Honor, have looked to the most closely
23 analogous statute under United States law. Here we
24 submit that that's 18 USC 2340A. That's the torture
25 statute, which is closest to the definition of torture

1 in the convention in which torture governs the law here.

2 THE COURT: Now, the Kentucky Court -- I
3 read the Kentucky Court's decision. That magistrate
4 judge disagreed.

5 MR. HEAPHY: Exactly.

6 THE COURT: And I forget exactly what did
7 the Oregon Court do, which would seem to be the two most
8 closely analogous cases to what we have here.

9 MR. HEAPHY: I don't believe the Oregon
10 Court faced that precise issue. But the Basic Court
11 did, Your Honor, exactly. Our position on Basic, on
12 that narrow of question, is that the Court essentially
13 got it wrong. The Court implied ex post facto right to
14 the fugitive really should not apply. That's because
15 they misinterpreted it -- in our view, the magistrate
16 judge misinterpreted this same treaty as a dual
17 criminality treaty. And Ms. Spence in her brief makes
18 the same assumption and argues that Article 1 of the
19 treaty makes this essentially a dual criminality treaty.
20 The same act must be criminal in both jurisdictions.

21 Looking closely at the plain language of the
22 treaty, which is where we submit the Court should start.
23 We think that's a faulty reading because from Article 1
24 of that treaty, explicitly refers to the crimes
25 enumerated in Article 2.

1 To read you the actual language: The
2 Government of the United States and the Government of
3 Servia mutually agree to deliver up persons who, having
4 been charged with or convicted of any crimes and
5 offenses specified in the following article, committed
6 within the jurisdiction of one of the high contracting
7 parties, shall seek an asylum or be found within the
8 territories of other: Provided, that this shall only be
9 done upon such evidence of criminality as, according to
10 the laws of the place where the fugitive or person so
11 charged shall be found, would justify his or her
12 apprehension and commitment for trial if the crime or
13 offense had been committed there.

14 In our view, Your Honor, that essentially is
15 saying that that is an evidentiary basis. That you have
16 to apply the same evidentiary standards to the crimes
17 you enumerated in Article 2. It's not a broad view of
18 criminality provision that exists in other treaties. A
19 crime has to be the same in the contracting parties. It
20 limits the consideration of that probable cause
21 standard. That's the standard that we apply here to the
22 crimes enumerated in Article 2.

23 I don't believe the Basic Court
24 (unintelligible). Article 1 does not broaden this to
25 anything that's a crime in both countries. Can it be

1 the crime for which extradition? Not at all. It limits
2 the crimes for which extradition is available to certain
3 enumerated crimes in Article 2. And Article 1 simply
4 says you have to apply whatever the standard is in that
5 country, the evidentiary standard, and that's here
6 probable cause.

7 THE COURT: Tell me, again, exactly what I'm
8 supposed to take out of the language that says that
9 extradition is to take place for participation in any of
10 the crimes and offenses mentioned in the treaty. And we
11 know that the convention against torture ends up being
12 part of the treaty now.

13 MR. HEAPHY: Exactly.

14 THE COURT: Right. Provided that the
15 participation may be punished in the United States as
16 felony and in Serbia as a crime. The way I read the
17 Basic Court is it said that in 1993 or 1992 torture
18 could not be punished in the United States as a crime
19 because of the ex post facto law. And that's in hence
20 the reason why the Basic Court then relies so heavily on
21 the 1993 document that may or may not be a charging
22 document, depending upon your view of it.

23 MR. HEAPHY: Exactly, Your Honor, that's
24 what the Basic Court did. The Basic Court essentially
25 said you have to have been able to bring this case, this

1 hypothetical case, in the United States in 1992, 1993.
2 Couldn't do that with the torture statute because it
3 hadn't been enacted. That reads an ex post facto right
4 into the treaty, which in our view, is contrary to clear
5 weight of authority repeating the ex post facto and
6 other constitutional protections don't apply. It
7 misreads Article 1.

8 Again, our suggested reading of the treaty
9 is that Article 1 said: For these crimes, these new
10 crimes in Article 2, you have to find that -- you have
11 to apply essentially the American evidentiary standard,
12 the probable cause. But, again, it only refers to
13 crimes that are listed. The torture convention, which
14 was enacted also after the fact, was grafted onto it.

15 So all we are doing, Your Honor, is we're
16 taking a newly defined crime, it was always criminal
17 under American law, first of all, the allegations here
18 would have violated many different American statutes.
19 But we are taking now a newly grafted listed crime,
20 according Article 2, the torture, and applying an
21 American evidentiary standard, probable cause. You
22 can't, I would submit, according to the well settled
23 principle that ex post facto -- we are not going back
24 hypothetically to whether a prosecution could have been
25 broad enough. That's an improper standard under the

1 plain reading of Article 1 and 2.

2 So we just think the Basic Court with
3 respect to that hypothetical American prosecution, that
4 would have started in 1992, is just a wrong standard.
5 All the court should have done was say is there a listed
6 offense under Article 2. And then Article 1 says apply
7 probable cause standard to that. And the court looking
8 for probable cause for torture clearly find, on that
9 record, that there was and not apply ex post facto
10 protection. That's what we submit.

11 As our first argument, the Court should
12 essentially follow Oppenheim and Hilario. Oppenheim is
13 exactly on point. That is a case in which the original
14 offense by the fugitive, Mr. Oppenheim, did not exist.
15 It was later codified under American law as a bankruptcy
16 fraud. And the court found him extraditable because ex
17 post facto doesn't apply. As long as it is a crime at
18 the time of the extradition clause, not at the time of
19 the original commission of the offense, then it's proper
20 under the treaty.

21 We submit the very same rule should apply
22 here. Do we have now at the time of the request a crime
23 that's listed under the treaty? Do we have probable
24 cause of that offense? That's really all the Court has
25 to find. And that does not allow an (unintelligible) of

1 ex post facto or any other constitutional right. That
2 would be inconsistent with the law, Your Honor.

3 THE COURT: So it's the Government's
4 viewpoint is you apply solely the statute of limitations
5 analysis under the torture statute.

6 MR. HEAPHY: The currently existing law at
7 the time of the extradition request, which today is
8 2340A, which has no statute with no serious bodily
9 injury. So here there is no statute and the Court
10 really should certify this that probable cause of
11 torture without regard to statute of limitations
12 because, one, does not apply under current American law.
13 To go back to this hypothetical prosecution is a
14 misreading of the treaty. And, Your Honor, I won't go
15 over all the cases again. We have cited the Oppenheim
16 case is the one that is most closely analogous. The
17 Hilario case was another case involving a change in law,
18 statutory law. Ms. Spence has argued that ex post facto
19 doesn't apply to interpretations of treaties or new
20 treaties.

21 THE COURT: A procedural-type thing.

22 MR. HEAPHY: Exactly. Our view, Your Honor,
23 is that any type of statute that postdates the
24 commission is similar, is not something that triggers
25 the ex post facto. Now, Basic went on obviously to find

1 that the very same document that we have at issue here
2 tolls the statute of limitation. Importantly, it was
3 exactly the same document. It was a document that was
4 filed in January of '93 that made allegations against, I
5 believe, 126 individuals including Ms. Basic and Mr.
6 Nezirovic.

7 THE COURT: If I followed Basic, and looking
8 at that document it indicates -- and this is where I
9 need some help in understanding the Bosnian section 142,
10 which I believe is the war crimes section. But it
11 indicates, it only lists 6 or 7 people that are
12 specifically identified as having been the victims of
13 the alleged conduct of Mr. Nezirovic. If I follow
14 Basic, is the war crimes statute broad enough to allow
15 extradition as to all of the individuals that are set
16 out in the Government's extradition document, which I
17 think is about 25 individuals, from whom statements were
18 taken that identified Mr. Nezirovic as having
19 participated in some type of alleged brutality in
20 prison?

21 MR. HEAPHY: Your Honor, I would submit
22 that's a question of Bosnian law for the Bosnians to
23 sort out. The charging document for violation of
24 section 142, I think it is, under Bosnian law does not
25 specify victims. It simply talks about war crimes

1 committed against civilians. That's the precise statute
2 or charge which we are submitting that the Court should
3 certify. You're right, the Basic Court did parse out
4 certain individual victims who were listed in the 1993
5 document and separated that from those who were not.

6 Our view, again, that is really a question
7 to be resolved in Bosnia because all of the
8 certification requests is for violation of 142 for
9 torture of civilians period. They then will parse out
10 whether or not certain victims are -- he hasn't even
11 been indicted under the Bosnian system and can't be
12 indicted until he's present. So I presume there will be
13 some more detailed accounting or charging document which
14 lists with more particularity who the victims are but
15 that's premature. He is simply charged with war crimes
16 against civilians and that's what we request the Court
17 certify.

18 Now the '93 document, Your Honor, tells the
19 statute of limitations. The Basic Court found that. It
20 was sufficient with particularity that lists the victims
21 it actually had attached to it. The statements that
22 were gathered from those victims. It identifies them by
23 name. In contrast to Ms. Basic, whose first or last
24 name I believe wasn't listed, Mr. Nezirovic's both names
25 are listed. It's very clearly him. We also have an

1 affidavit from the Bosnian prosecutor, again,
2 authoritative document from an official, legal official
3 in Bosnia, who finds that is an initial document in any
4 Bosnian criminal case, it constitutes a procedural
5 action which interrupted the course of limitations of
6 criminal prosecution. It says if there was a statute it
7 would have been tolled in Bosnia by that doctrine.

8 We submit that's an authoritative
9 interpretation of the validity of the 1992 doctrine.
10 And the Court, again, presuming that the Bosnians know
11 their law, presuming that we interpret those documents
12 favorably, that anything close favors the extradition.
13 That clearly establishes that that document tolls that
14 statute of limitations.

15 Even if we didn't have that, Your Honor,
16 that affidavit is just the functional equivalent of an
17 American Information. It does specify identity
18 particularly the area of timeframe allegation. It
19 includes the information that would be in a criminal
20 indictment. And significantly, Your Honor, that '93
21 document kicked off a series of proceedings in Bosnia
22 demonstrating its validity. Most importantly, the
23 document that was filed in 1993 was later reviewed by
24 this International War Crimes Tribunal, which
25 essentially blessed it and passed it along to the

1 Bosnian government for pursuit. That was part of the
2 '95 Dayton Peace Accords.

3 So to the extent there is some question as
4 to its legitimacy, the International Tribunal confirmed it
5 by saying it is a valid document which can be pursued by
6 the Bosnian government.

7 THE COURT: But the arrest warrant and the
8 other charging document, do they refer back to this 1993
9 document to where it's clear that it is an extension of
10 what was begun in January of '93?

11 MR. HEAPHY: Your Honor, I don't believe
12 that the 2003 document for which we only have a
13 translation specifically references the 1993 document.
14 It does not say pursuant to the act of January 1993, no.
15 But, again, our job is not to look beyond the plain
16 interpretation of the Bosnian prosecutor and the plain
17 language of the documents and try to impose an American
18 veneer of procedural fairness. We have a very different
19 system that exists in the Bosnia civil law system and an
20 opinion by the Bosnian prosecutor. But that document
21 issued by a legitimate government is valid and kicked
22 off the process which is still ongoing, if there is
23 certification, which will ultimately result in a further
24 charge and indictment and a proceeding in adjudication
25 of Mr. Nezirovic.

1 So, Your Honor, in terms of Basic, again to
2 summarize, we think that the court wrongly brought this
3 back to a hypothetical prosecution in American courts
4 from 1992. We think the Court should essentially comply
5 to 2340A. That would be much more consistent with the
6 overwhelming authority that ex post facto doesn't apply
7 in extradition. In list treaty cases, which this is,
8 not a dual criminality treaty case (unintelligible).
9 Even if the Court does apply the Basic logic and find
10 that the statute of limitations does apply, the '93
11 document tolls that and that further justifies it.

12 THE COURT: Even if it's a dual criminality
13 treaty, it doesn't change the way in which the
14 Government looks at it. Ex post facto still doesn't
15 apply. The convention against torture gets incorporated
16 in.

17 MR. HEAPHY: Exactly. I am simply reacting
18 to Ms. Spence's argument or the Basic Court in trying
19 to, sort of, rebut the presumptions that underlie their
20 position. But you're exactly right, whatever kind of
21 treaty this is, we think Oppenheim, Hilario and the
22 other cases make clear that ex post facto is not
23 available. That you apply the law and enforce at the
24 time of the request and not at the time of the alleged
25 criminal conduct. That's what we ask the Court to do

1 here. Anything else on statute of limitations?

2 THE COURT: No, that covers it.

3 MR. HEAPHY: Well, I'll go on quickly to the
4 political offense issue in the other way which Ms.
5 Spence argues that this is not a crime covered by the
6 treaty. That it's a political offense. The standard
7 for that is articulated in the Fourth Circuit in the
8 Ordinola case. It classified two things. The presence
9 of a violent political disturbance; and two, whether the
10 alleged offense was incidental to or in furtherance of
11 the uprising.

12 Here, Your Honor, we have the presence of a
13 violent political disturbance. But we do have serious
14 beliefs highly that the alleged offense was nowhere
15 close to the incident to or in furtherance of the
16 uprising. The policy here is to protect people who just
17 fought back against their government to secure political
18 change. Not a shield for common criminals whose crimes
19 occurred during a time of political disorder.

20 That's straight from Fourth Circuit in
21 Ordinola. What we have here is not someone who is
22 justly fighting back against government but rather a
23 common criminal who used the political context to
24 persecute and degrade and inhumanly treat civilians. In
25 Ordinola the fugitive is a member of a military unit who

1 sought extradition for his offenses of homicide,
2 kidnaping, forced disappearance. The court rejected the
3 political offense exception focusing on mode of
4 commission of the offenses and the nature of the
5 victims.

6 Here both of those factors, motive, attack
7 and identity of the victims, defeat any political
8 offense claim. Let's first talk about the victims, Your
9 Honor. The material received from Bosnia, again make
10 clear, these were unarmed civilians. These were not
11 offenses committed on a battlefield. They were rather
12 done in a prison setting with defenseless individuals.
13 Who, according to the Bosnians, were civilians and not
14 combatants of any sort.

15 THE COURT: Does it matter? I understand
16 one of the arguments and this is more made at the
17 evidentiary hearing, is that almost all the combatants
18 during this civil war were civilians in many respects.
19 Both came out of their ordinary lives and thrown into
20 this conflict to protect themselves and families and so
21 forth. So it became a true civil war. So all of the
22 combatants were civilians at heart. So everyone that
23 winds up in the prisons are civilians.

24 MR. HEAPHY: If Mr. Nezirovic had done this
25 to uniformed military personnel, who had been captured

1 on the battlefield, this would still be torture.

2 Whether or not they were or were not at some
3 point engaged in combat, doesn't matter. The point is,
4 at the time of the commission of these offenses they
5 were not combatants. They were prisoners. They were
6 unarmed. They were not engaged in any fighting. They
7 were simply being held in a prison facility.

8 Regardless of the fact that it's a civil war
9 and it's messy and there was a lot of terrible things
10 that went on, on both sides, the fact remains at the
11 time of these offenses they were civilians. And the
12 Bosnian affidavit establishes that. Again, we have to
13 take that as established. These were civilians. So the
14 identity of the victims here, Your Honor, removes this
15 from the realm of the political offense. The Department
16 of State has made clear torture of unarmed civilians can
17 never be a political offense. It's always against
18 International law. The defense's own expert confirmed
19 that torture against prisoners in International law
20 cannot be justified by some sort of political gain.

21 The other thing that's significant here,
22 Your Honor, is pay close attention to what Mr.
23 Nezirovic said. He did not claim any sort of political
24 motivation. When he testified, he actually told this
25 Court that he joined the HVO to protect his family and

1 that his job at the Rabic camp was to keep people locked
2 up; far from describing some sort of larger goal of
3 protecting his way of life or government. He simply
4 says that he was there to protect his family. A very
5 personal motivation. Not a political motivation where
6 he was engaged in some larger struggle to protect the
7 integrity of the formal government. His own testimony
8 was it was a personal desire to protect his family. And
9 the only way he believed he could do that, according to
10 him, was to join this military unit. So his own
11 testimony takes it out of the realm of the political.

12 Then finally, the mode of attack is the
13 other facture cited by the Ordinola Court. The mode of
14 attack here, Your Honor, was torture, degrading
15 treatment, forcing people to strip naked and put
16 anal/nasal contact, urinating on the ground and forcing
17 prisoners to graze on that grass. That mode of attack
18 far from holding prisoners so they would be isolated
19 from the battlefield, he is not being prosecuted for
20 that. He is being prosecuted in Bosnia for the
21 degrading torture.

22 We heard testimony of the three-finger
23 salute or three-finger sign that the Serbs used as a
24 Nationalistic and religious significance. The evidence
25 is that Mr. Nezirovic would have the prisoners put their

1 fingers on a table and beat it repeatedly. That
2 demonstrates an ethnic bias far from simply neutralizing
3 people from the battlefield but persecuting them in a
4 way due to their ethnicity, national position and their
5 religion. Those are the allegations that we have here.
6 The Bosnian government has made clear that we have to
7 accept. And all of that, Your Honor, the mode of attack
8 in particular, takes this well beyond the realm of the
9 political.

10 So in our view, there simply can be no
11 political offense exception. Yes, it occurred, these
12 awful offenses in context of a political conflict. But
13 the fact they are civilians and degrading treatment on
14 which Mr. Nezirovic inflicted them, removes this from
15 the realm of political offense and the Court should
16 reject that as a possible defense for extradition.

17 That's all I have on the political offense
18 exception. Is there anything else on either issue that
19 I can answer?

20 THE COURT: No, sir.

21 MR. HEAPHY: Then I'll reverse it until
22 after Ms. Spence.

23 THE COURT: Ms. Spence, good morning.

24 MS. SPENCE: Thank you, Your Honor. From
25 all of the scholarly reading about treaties in general,

1 list treaties do not do away with dual criminality
2 requirements. They are in addition to it. And language
3 in this treaty is the same. It is a dual criminality
4 and list treaty. And this is particularly significant
5 because in the list nothing pertaining to assault or
6 wounding was an extraditable offense.

7 So, but for the convention against torture,
8 modification of the treaty making torture an
9 extraditable offense, this wouldn't have been
10 extraditable at all. That's where ex post facto comes
11 into play. It doesn't apply to a treaty. So now his
12 conduct became extraditable but the statute of
13 limitations issue is separate because it's still in the
14 treaty. It says the statute of limitations.

15 THE COURT: Other than the Basic Court, has
16 any other court found that the ex post facto analysis
17 applies to a statute of limitations in the way which
18 Basic did?

19 MS. SPENCE: I have not found a court that
20 ruled either way. In the Oregon case they weren't
21 arguing under the war crimes statute. It was either
22 homicide or attempted homicide and the attempted
23 homicide was subject to the five-year limitation. By
24 implication the government didn't even try to argue that
25 the war crimes statute applied retroactively. This

1 would seem that a new argument is being presented here
2 in the most recent cases. So I have not found another
3 court that rules as Kentucky did, but I haven't found
4 any that ruled against them. The reasoning is
5 persuasive when you look at the purposes of the statute
6 of limitations. This isn't the statute of limitations
7 in Bosnia. By the terms of the treaty, it's the.

8 Statute of limitations that would apply in
9 the country to which the request is sent. That's our
10 statute.

11 THE COURT: Let me ask you then: With
12 respect to -- if under the dual criminality analysis,
13 you use the torture statute for purposes of arriving at
14 there is dual criminality, and Mr. Nezirovic doesn't
15 disagree that the ex post facto laws allow you to do
16 that, then the question becomes: What statute of
17 limitations do you use, if the most closely analogous
18 statute you're now saying can't be used for purposes of
19 the statute of limitations?

20 MS. SPENCE: That's because you have to look
21 at the entire spectrum of what is happening here. By
22 making it an extraditable crime, that doesn't make it
23 punishable in the United States under that statute at
24 the time it occurred. That's when dual criminality
25 comes in. Because their interpretation is broad, they

1 are not limited to extraditing him just for torture.
2 They can extradite him for any torture-related crimes
3 that describes the same behavior that was unlawful in
4 this country at the time it occurred as the treaty
5 requires. That's the dual criminality side of it.

6 So even though torture is extraditable, our
7 statute didn't exist at the time but other statutes
8 punishing the same type of behavior did exist, and they
9 can be applied. And that's why the statute of
10 limitations is applicable to those crimes is the one
11 that would have to apply, not the statute of limitations
12 applicable to a crime that wasn't a crime in this
13 country at the time it had to be committed in order to
14 fall under the treaty.

15 THE COURT: So the convention against
16 torture was passed in '94?

17 MS. SPENCE: Yes.

18 THE COURT: So if the extradition request
19 came in, in 1999 let's say, even though he would have
20 been extraditable under the torture statute and all the
21 statute of limitations, if you take the eight year would
22 apply, he still couldn't be extradited because the
23 statute of limitations would have expired for all
24 assault-based offenses. That might satisfy the dual
25 criminality analysis.

1 MS. SPENCE: That's correct. I would argue
2 the eight-year statute could not apply.

3 THE COURT: But has any other case, and I
4 don't know the answer to this so I'm asking, that uses
5 one statute for purposes of establishing dual
6 criminality and then says we can't use that statute then
7 for the analysis of whether the prosecution could still
8 occur in the United States?

9 MS. SPENCE: I have not seen any case other
10 than Basic, which the issue of whether or not an offense
11 is extraditable within the terms of a treaty and whether
12 the statute of limitations is an issue at the same time.
13 All of the cases cited by the Government discussing ex
14 post facto involve treaty amendments that made an
15 offense extraditable, whether it was a bankruptcy case
16 in Oppenheim or anything like that, that could change to
17 the treaty, or the changes to the law that made it fall
18 within the treaty was the substantive offense that the
19 statute of limitations wasn't an issue.

20 THE COURT: Right. When the Basic Court
21 made its holding that ex post facto law applies to the
22 substantive analysis of the statute of limitations, he
23 didn't cite any case.

24 MS. SPENCE: There are no cases against it
25 or no cases in agreement with it. There are just no

1 cases.

2 THE COURT: And this is the thing I love
3 about the Basic case; that is, that both you love it and
4 both of you hate it. The reason being is because if
5 that judge is right, and you apply the ex post facto
6 law, then why can't I then follow, if I follow Basic
7 with respect ex post facto, why do I not then follow
8 him, the judge, in finding that the exact same document
9 that's before this Court from January of 1993 was a
10 charging document?

11 MS. SPENCE: Because the arguments made in
12 that case were not the ones that we are making now.
13 They were not made for whatever reason. The one I'm
14 making now have been followed by other courts that it
15 was not a charging document.

16 THE COURT: Do we know they weren't made or
17 just that the Court didn't address them? I haven't
18 looked at the briefs to know whether those arguments
19 were made.

20 MS. SPENCE: There are some actual cases
21 discussing and there is one from Eastern District of
22 Virginia: In The Matter of Extradition of Dwakel. That
23 held that basically a police report, no matter how
24 thorough, is not the functional equivalent of an
25 indictment, Information or arrest warrant. That's what

1 we have here. It looks exactly like the same type of
2 very thorough reports that ICE, ATF, DEA or FBI would
3 send to the United States attorneys listing what
4 happened, who the victims were, who the witnesses were,
5 and what the documents were, but then to make the
6 decision to proceed to bring the charge. That's what
7 this letter from the head of the police agency, which is
8 part of the military for the Republic of Srpska, before
9 the Republic of Srpska was a recognized entity, alleged
10 it's a police report. Although, however thorough it may
11 be, it is not the functional equivalent of an
12 indictment.

13 In addition to the Eastern District of
14 Virginia, another court holding that a police report is
15 not enough would be the District Court of New Jersey, In
16 The Matter of Extradition of Betrand, which is cited in
17 brief. And also, In the matter of Assarsson, which is a
18 Seventh Circuit case, 635 F.2d 1237.

19 The magistrate judge in Kentucky did not
20 benefit from hearing those case cites or hearing that
21 argument. I suggest that had he heard them, he probably
22 would have ruled differently. Because they got involved
23 in a dispute over whether or not all the victims had
24 been listed in that report; whether or not the same acts
25 had been alleged in that report. They didn't dispute

1 that it was a charging document.

2 THE COURT: Well, can I look into Bosnian
3 law as to what is a charging document? There is a 2010
4 Michigan State Law Review page 103. It talks about --
5 the title of it is Statutes of Limitations and
6 International Extradition. I thought it might be
7 relevant. In dealing with this initiation of criminal
8 proceedings, it says: When considering a foreign
9 request for the extradition of a fugitive, it is often
10 not feasible under 3282 to apply common law concept
11 reflecting the initiation of criminal proceedings such
12 as the return of the indictment or the filing of an
13 Information. Because the foreign country making the
14 request often operate under criminal justice systems
15 rooted in civil law traditions.

16 It says: As a result in determining whether
17 the five-year limitations appeared under 3282 has
18 expired, the inquiry undertaken by the courts focused on
19 whether a prosecution has been initiated under the
20 foreign country's laws.

21 Once I get an affidavit from the prosecutor
22 in Bosnia that says this is the way we start our
23 proceedings. Can I look behind that?

24 MS. SPENCE: Yes. The Eastern District of
25 Virginia magistrate judge said the bald assertion of the

1 prosecutor alone is not enough as to what constitutes a
2 functional equivalent. What you also have to do is look
3 at everything else in context; that is, an arrest
4 warrant. They've issued arrest warrants. The arrest
5 warrant has been the guiding document in the Oregon
6 case. The arrest warrant was the guiding document that
7 was looked at in almost all of the other cases. I guess
8 they are now trying to shift it backwards, because they
9 are now working on cases that arrest warrants were not
10 issued. The arrest functional equivalent of an
11 indictment or an arrest warrant. The Seventh Circuit in
12 addressing an extradition request from the Swiss courts
13 note that the presence of an arrest warrant was
14 sufficient, even if they didn't follow the same kinds of
15 procedures we would have to issue an arrest warrant. It
16 was an arrest warrant. Something that said you can
17 detain this person. The police report was not.

18 THE COURT: But essentially what the
19 Government's argument is, if I understand it, is that
20 under Bosnian law, this is the way you begin a criminal
21 proceeding, and you can't actually indict him until the
22 person comes back and has an opportunity to be
23 questioned.

24 MS. SPENCE: That's true. You can't indict
25 them, but you can still issue an arrest warrant or

1 request an arrest warrant but they did it too late.

2 THE COURT: But if they didn't do that in
3 '93, does that then make this document absolutely
4 something that this Court can't use for analyzing
5 whether they began a prosecution at that point?

6 MS. SPENCE: Yes, Your Honor, I would say
7 that it does. It's just like if the report from the FBI
8 went to the United States attorneys office and got
9 buried under other papers and it just didn't get
10 addressed. They are not signed by an attorney but by
11 the police chief. It is not the same as the initiation
12 of a court proceeding. That's what, in reading all the
13 cases that have analyzed this issue, not just from
14 Bosnia but from other countries. You look at the nature
15 of who is making the determination, whether it's an
16 independent neutral person, like a judge, or whether
17 it's a police agency. You look at whether or not the
18 authority to detain or arrest has been issued. You look
19 at those factors. Those factors were not created by the
20 1993 police report. It shows they were under
21 investigation. But under the international standards
22 for when the statute of limitations tolls, they are not
23 the functional equivalent of an indictment or arrest
24 warrant.

25 We are trying to compare apples and oranges

1 to some extent. But even under the different systems,
2 there is a difference between a police report and
3 criminal charges, criminal proceedings; a custody order
4 issued by the court, a detention order, an indictment,
5 an arrest warrant. Whatever you call it, they are
6 different in this country and that country, but they
7 have one. That's what has been used to toll the statute
8 in the Oregon case and the other cases. In this case
9 that custody order was not entered in 2003, that arrest
10 warrant.

11 THE COURT: Let's go back to the ex post
12 facto and what the substantive analysis is that's used.
13 I am looking specifically at the language of Article 7.
14 It says: Extradition shall not be granted in pursuance
15 to the provisions of this treaty. If legal proceedings
16 or the enforcement of the penalty for the act committed
17 by the person claimed has become barred by limitation,
18 according to the laws of the country.

19 Now, an ex post facto law, is not -- is that
20 a statute of limitations argument? It's a
21 constitutional argument.

22 MS. SPENCE: It's a constitutional argument.

23 THE COURT: So what I'm trying to wrestle
24 with is whether, if I accept your argument that it's a
25 dual criminality treaty and that I can use the

1 convention against torture for purposes of establishing
2 whether there is dual criminality here. Do I then use
3 the convention against torture to establish for purposes
4 of trying to determine the statute of limitations? And
5 Article 7 only goes to limitations.

6 MS. SPENCE: That's true.

7 THE COURT: What do I do there?

8 MS. SPENCE: The limitation in the United
9 States could not be under a statute that didn't exist at
10 the time the offense was committed. If he were
11 prosecuted in the states, if at all, it would have to
12 have been under an assault or conflict of statute that
13 was in existence at the time the acts were committed.
14 How can you say if the statute has run on something that
15 he couldn't have been charged for.

16 THE COURT: That's where, and perhaps my
17 mind doesn't fully wrap itself around International law.
18 That's where I have a hard time trying to understand why
19 I can use the torture statute for purposes of dual
20 criminality, but I can't use it for purposes of the
21 statute of limitations.

22 MS. SPENCE: It's not really for dual
23 criminality as much as it is because it makes it a
24 listed crime.

25 THE COURT: Right.

1 MS. SPENCE: Because there was no --

2 THE COURT: It also has to be a crime in the
3 United States.

4 MS. SPENCE: That's right; and it is a
5 crime. It was at the time it occurred just not called
6 torture. But at the time it occurred it wasn't an
7 extraditable offense. That's the actions, the
8 underlying actions were criminal, just not extraditable.
9 The treaty was amended against torture to make it
10 extraditable. So then you have to look at why was it
11 criminal at the time it occurred. Not because of our
12 torture statute but because of the substantive law on
13 assault maybe.

14 THE COURT: So it's your argument you can't
15 even use the torture statute --

16 MS. SPENCE: That's right.

17 THE COURT: -- for purposes of the dual
18 criminality arm of the analysis that you contend needs
19 to be made?

20 MS. SPENCE: That's correct. You can only
21 use it for purposes of getting it in the list crimes
22 that are extraditable in the first place. And dual
23 criminality is an additional crime. The dual
24 criminality in that by the fact that the underlying
25 conduct was punishable.

1 THE COURT: Now, but doesn't Oppenheim go
2 against that argument?

3 MS. SPENCE: No, it does not.

4 THE COURT: Why?

5 MS. SPENCE: Because it was a fraud case
6 that arose -- and it wouldn't have been extraditable
7 under the way that treaty was written until it was
8 considered a bankruptcy offense under that treaty.

9 THE COURT: Bank fraud offense.

10 MS. SPENCE: Bankruptcy fraud; filing a
11 false statement of assets. So -- because the bankruptcy
12 code was amended --

13 THE COURT: Actually I think it was bank
14 fraud because this was in the 1920s.

15 MS. SPENCE: It was 1927 but it was
16 bankruptcy because -- it was new in the United States,
17 bankruptcy, and the code was amended. I will give you
18 the specifics.

19 THE COURT: Actually, I think Ireland had
20 tried to extradite him and he had prevailed. So
21 Congress went back to work and changed the law. It
22 became then a crime under -- the statute that then
23 existed on our books, and then he was extradited under
24 the same treaty. They didn't amend the treaty, I don't
25 believe.

1 MS. SPENCE: Well, Scotland and the United
2 States, the treaty had been amended in 1905 to include
3 bankruptcy laws it made criminal by the laws of both
4 countries. The fraudulent act occurred in 1924. The
5 United States had a bankruptcy code in 1898 but it was
6 the 1926 amendment that made that particular crime
7 punishable under the bankruptcy statute, not just under
8 other items. The other items weren't extraditable
9 offenses originally. But once the crime fell within
10 bankruptcy, it was an extraditable crime. There was no
11 statute of limitations issue because it was still within
12 the statute of limitations. That's where this case
13 differs. If this case had been filed within five years
14 of the conduct of '92, then the statute of limitations
15 wouldn't be an issue. It wouldn't matter whether it was
16 the torture statute or assault statute or whatever. All
17 that does is make it an extraditable crime. Just like
18 in Oppenheim. It made it an extraditable crime. It
19 didn't change the statute of limitations. There is no
20 interaction there of making something illegal that had
21 previously been legal. That wasn't the issue in
22 Oppenheim.

23 THE COURT: I mean, the Oppenheim Court said
24 that it simply made clear that it was long-standing
25 conduct that was criminal.

1 MS. SPENCE: Yes.

2 THE COURT: That was then brought into that
3 statute.

4 MS. SPENCE: All that did was make it
5 extraditable.

6 THE COURT: But the alleged conduct here is
7 long-standing conduct that was criminal as well.

8 MS. SPENCE: And it became extraditable but
9 it didn't change the statute of limitations. It didn't
10 change the analysis of what under a dual criminality
11 analysis what law would apply. If there had been no
12 assault laws, then I would be arguing that it wasn't
13 even an extraditable offense because there was no dual
14 criminality. But it could be punishable just not under
15 the one called torture. So you have to apply the law
16 that it could have been applied to. It would be the
17 only reasonable reading of both Article 7 on the statute
18 of limitations of the country the request is addressed
19 to and dual criminality language and the listed offense.

20 THE COURT: Okay. All right. Political
21 offense.

22 MS. SPENCE: Whether a conduct is incidental
23 to civil conflict is different from whether it's in
24 furtherance of. That's why both terms are included.
25 Defending oneself and family from a politically

1 motivated attack of necessity is just as political as
2 bringing the attack.

3 THE COURT: Let's say I agree with you. Is
4 there then still a distinction to be drawn by a prison
5 guard, who by definition is charged with holding people,
6 essentially off the war field, is there a difference
7 between a person acting as a prison guard and a person
8 when they have prisoners then beating them when they are
9 unarmed and are not presenting an imminent threat to
10 that person, as is alleged here? Is that incidental to
11 a political situation?

12 MS. SPENCE: It isn't incidental to it when
13 one looks at the emotionally charged reasons for what
14 was happening. This was during the very first and
15 second month of the war. During the very period of time
16 when everything in this town was being bombed; the
17 churches, schools, hospitals, everything. And the
18 emotional reaction that one might feel and this is where
19 Castioni makes a very good point; what men do in passion
20 in pursuit of political objectives, in this case driving
21 out the attackers, can't really be measured by reason.
22 That's why the question is whether it was related to it
23 or whether it wasn't. This isn't a case of someone
24 using the state of the economy or state of affairs in
25 the country to go out and loot and claim that that was

1 politically motivated.

2 THE COURT: Can you say that it's passion
3 when, to a great extent, these acts don't take place on
4 the battlefield. They take place, in fact, removed from
5 the battlefield in a prison setting where the argument
6 is and the allegations are that they are deliberately
7 motivated simply because a person wasn't an alleged
8 enemy combatant.

9 If you're argument is right, wouldn't it be
10 true then that the torture of any prisoner is incidental
11 to a political uprising?

12 MS. SPENCE: It may be with the exception of
13 the way International law defines crimes against
14 humanity. A crime against humanity is defined as
15 something that is systematic and prevalent and ordained
16 from the top down, if you will, that's part of a
17 pattern, a plan to beat prisoners. There is no evidence
18 of that in this case.

19 THE COURT: But doesn't that remove it from
20 the political offense exception, if it's personal? If
21 it is: I'm simply mad at these folks that are
22 destroying my town.

23 MS. SPENCE: No, I don't think that makes it
24 personal. If he were attacking them, rather than
25 defending against them for only personal reasons, then

1 it wouldn't be political. But to be angry over a
2 political attack that is destroying your life, I think
3 it's both personal and political. The personal aspect
4 of it keeps it from rising to a crime against humanity.
5 It's not something that he was allegedly directed to do
6 by higher-ups.

7 THE COURT: Does it matter that these
8 persons are civilians or alleged to be?

9 MS. SPENCE: As Mr. Heaphy noted under the
10 law, even if they were uniformed prisoners, uniformed
11 military men, once they became prisoners, they are
12 quote, civilians for purposes of the non-torture. So,
13 no, I don't think it matters. It is true that they were
14 prisoners. It may even be true that the conduct alleged
15 would amount to torture but it does not arise to crimes
16 against humanity that would put it outside of the
17 political offense exception. If it did, we would be at
18 the point where the political offense statute might as
19 well not exist. And maybe that's where we're headed but
20 for right now it is still in there and it is a political
21 offense.

22 THE COURT: Doesn't your argument almost do
23 the opposite; and that is, make all conduct, if it takes
24 place as a result of the civil war, it makes all conduct
25 fall within the political offense?

1 MS. SPENCE: No, and I'll tell you why not.
2 That's because of the facts that happened in this case
3 that Doctor Dahlman testified about. When he was
4 talking about the equivocation -- on page 61 of the
5 transcript.

6 The equivocation of all sides being equally
7 guilty of starting the war and equally guilty of
8 atrocities during the war, and so on, which was created
9 by the Bosnian Serb leadership -- Serbian and Bosnian
10 Serb leadership to hide that they were the clear
11 aggressors at the start of the war.

12 When we look at the facts and look at the
13 evidence, and look at the cases thus far, only the
14 organized plans that we can see, the only plan for
15 organized violence and ethnic cleansing, begin with
16 started with the breakaway Bosnian Serb armed forces,
17 the Bosnian Serb army and the Croatian Serb army, such
18 as they became; that they had planned to conquer
19 territory through these forms of violence. That much is
20 clear. And that, by and large, accounts for most of the
21 atrocities that are known to have existed during the
22 war.

23 If we look at the number of killed and
24 missing, we clearly see the targets of the Bosnian Serbs
25 were the ones who were disproportionately harmed by the

1 war.

2 Then he goes onto say: That other forces
3 occasionally engaged in activities that have been
4 described as war crimes, but they were smaller in scope
5 and not part of the larger campaign.

6 THE COURT: I think that Mr. Heaphy's
7 response to that is that satisfies the first prong and
8 then the second prong which the Ordinola Court talks to
9 as much as anything else is the subjective purposes
10 behind the alleged actions by Mr. Nezirovic. When you
11 look at his testimony, Mr. Heaphy is right, is he not,
12 that Mr. Nezirovic testified that he chose the side that
13 he chose to protect his family?

14 MS. SPENCE: That's because the other side
15 was attacking his family.

16 THE COURT: Right. But he chose to protect
17 his family and that's the reason that he joined the
18 army, and he had been on the front lines and then he
19 came back and he was in the prison camp. He didn't have
20 a political banner necessarily he was raising. He was
21 doing whatever was necessary to protect his family. So
22 that then gets to the question of: Does that then make
23 this political conduct as opposed to survival?

24 MS. SPENCE: I would say there is not much
25 of a difference when you are the ones being attacked.

1 It might be different if you're the attacker and it's
2 personal as opposed to political. But when you're
3 defending your family, your town, your way of life, it's
4 personal and political. And, no, I don't think that his
5 testimony makes it any less political just because he
6 acknowledged the personal stake in it.

7 THE COURT: I think you may be right with
8 respect to acts that occur on the battlefield, if he's
9 alleged to have killed one or more enemy combatants.
10 The question then becomes: Does that political
11 motivation continue once you go into a prison setting
12 and don't have an imminent danger that is facing you?
13 And the allegation is that persons are selected because
14 of their ethnicity and beaten.

15 MS. SPENCE: That wouldn't be fair to say
16 they are selected for their ethnicity when the people
17 who were trying to do the ethnic cleansing were the ones
18 with the bias and attacking them. His wife is half
19 Serbian.

20 THE COURT: If the allegation was that Mr.
21 Nezirovic had, in this conduct, killed a prisoner, would
22 the same political offense exception argument apply?

23 MS. SPENCE: Possibly it could. In Castioni
24 and in other cases, killings have been held to be
25 political offenses. And in Castioni it wasn't on the

1 battlefield. It was in the general assembly room where
2 the crowd had broken through and were being rallied and
3 they were angry.

4 THE COURT: In a political forum.

5 MS. SPENCE: In a political forum. When
6 you're talking about a war prison, this isn't any
7 regular prison, this is a war prison. That's just as
8 political forum as anywhere else when you're in the
9 middle of a war. However much we may not condone
10 torture, and certainly since the days of Nazi Germany
11 our consciousness has been raised significantly about
12 this, but I think what you have gotten in this situation
13 is tantamount to the German Nazis coming around and
14 saying that this Jewish person who beat up those he
15 believed had killed some of his neighbors was a war
16 criminal. It was politically motivated in defense of
17 his home, family and town. Even though they were
18 temporarily prisoners of war, they were regularly being
19 exchanged. That was one of the things that came out in
20 Doctor Dahlman's testimony. Prisoners were often taken
21 to be exchanged to get other people back.

22 So if you believe these people killed people
23 that were his neighbors and bombed his church and
24 synagogue, and they were going to be leaving again doing
25 the same thing, it's very politically charged. To say

1 it isn't, is engaging in the highest level of
2 (unintelligible). This is a war under circumstances
3 that I can only imagine from everything I have read and
4 just that much is horrifying.

5 The statute of limitations, although, is a
6 totally separate issue, when you look at the politically
7 charged situation, both then and now, the statute of
8 limitations is supposed to serve as something that puts
9 an end to something and allows healing. He is not
10 alleged to have committed genocide and killed anyone.
11 This was 20 years ago. At what point are we going to
12 stop allowing -- and the same thing they did before and
13 during the war, which is the way they were battling on
14 the International stage. They were trying to argue that
15 they were by right the conquerer of territory and should
16 be recognized. They were trying to play the victims
17 rather than the aggressors and then try to have it both
18 ways.

19 They have argued repeatedly and failed to
20 honor the International Tribunal prosecutions for war
21 crimes saying war crimes didn't happen. And then
22 finally saying, yes, they did happen, but we all did it
23 and so let's prosecute everybody. That's the political
24 context in which this arises.

25 THE COURT: That's more of an argument that

1 this is a political prosecution as opposed to the
2 actions are not extraditable because they are political.

3 MS. SPENCE: That's true but they are
4 interrelated. It's a political prosecution, because he
5 committed a political offense. He fought back. If he
6 had done what so many did and left, he wouldn't be here.
7 He fought back. Everyone who fought back --

8 THE COURT: He is not here for fighting.
9 He's here for beating people in a prison.

10 MS. SPENCE: He's here for fighting back in
11 the way people fought there at that time. We can't look
12 at it in a vacuum. The Serbs had already begun ethnic
13 cleansing of his community. They had already begun the
14 rape camps that they were sending the women to. They
15 had begun publically killing people just to make a point
16 to leave this area, because they are claiming it as
17 ours. So what he did in his prison compared to what
18 they were doing in their prisons, you can't say it's not
19 a political offense in context, in the whole context of
20 what was going on. It was the way they fought. We may
21 not like the way they fought.

22 As an International community we are trying
23 to move away from that, I grant you. But to judge him
24 by today's standards for what he did that was political
25 by the standards of the country and time and place where

1 he found himself, would be unfair.

2 THE COURT: Okay. Thank you, Ms. Spence.

3 MR. HEAPHY: Yes, Your Honor. Thank you. I
4 want to go back to your question before about the Basic
5 Court's authority for its interpretation on the statute
6 of limitations. You're right, Your Honor, Basic Court
7 cites no authority for its conclusion that the relevant
8 test is to go back to 1992 and examine whether or not
9 there could have been an American prosecution.
10 Absolutely none. We would suggest that that's
11 obstructive because there is no authority. It also does
12 not, the magistrate judge does not distinguish the clear
13 way that goes contrary and that is the Oppenheim case,
14 which we've already discussed thoroughly.

15 The Hilario case which was a statutory
16 change, which made it possible to extradite its
17 citizens, not a treaty amendment, not a new treaty but a
18 statutory change that happened in the intervening period
19 between the offense and extradition.

20 The McMullen case. The fugitive was
21 extradited pursuant to a treaty that hadn't passed and
22 the court rejected an ex post facto challenge. The
23 extradition proceeding is not a criminal prosecution.
24 Accordingly, (unintelligible) of a successful defense to
25 extradition is not a criminal function. That's what we

1 are dealing with here; is the statute of limitations as
2 a defense to extradition.

3 In the McMullen Court, while that did(n't)
4 involve a change in the treaty, it explicitly finds
5 correctly, consistent with all that authority, that
6 changes in law which would move the defense to
7 extradition don't get ex post facto. As the Court said
8 ex post facto is a constitutional protection.

9 THE COURT: If I find that Mr. Nezirovic is
10 correct that you can't use the torture statute, you're
11 left with the assault statute.

12 MR. HEAPHY: Right.

13 THE COURT: Which is five years.

14 MR. HEAPHY: Right.

15 THE COURT: Then you have to hang your hat
16 on the 1993 charging document.

17 MR. HEAPHY: Right.

18 THE COURT: Because essentially what Ms.
19 Spence's argument is; that is, if in 2010 the United
20 States and Bosnian government amended their treaty and
21 then the United States Congress then subsequently passed
22 a substantive criminal statute, that would have
23 essentially criminalized acts that occurred 20 years
24 earlier that this Court could not look at that and apply
25 some type of ex post facto analysis. It would be

1 required to send -- whether Mr. Nezirovic is not a
2 United States citizen, but it would be required to send
3 back someone who is legally in this country to face
4 charges for something that was not a criminal act in
5 this country that occurred 20 years earlier.

6 MR. HEAPHY: Exactly. That's because this
7 is foreign policy. We give full faith and credit to the
8 actions of other governments. This is not an American
9 criminal proceeding at which the constitution applies
10 and people have a right to not be charged with something
11 that wasn't a crime at the time of their offense. This
12 is a fundamentally separate kind of proceeding. My role
13 and your role is simply to effectuate, according to the
14 rules which have been set forth in the treaty, at the
15 request from a foreign government. It's that simple.

16 The DiMenna case, that's a case in which
17 Israel sought to extradite someone for something that
18 occurred before it was even a county; didn't even exist
19 at the time. The court said, okay, that's fine.

20 THE COURT: But the treaty does have, when
21 you step back and look at it from a policy standpoint,
22 it has kind of an overarching guide; and that is, no
23 country is going to extradite to the other unless the
24 extraditing country finds that conduct essentially to
25 violate its own --

1 MR. HEAPHY: Exactly. We had to enact a
2 torture statute in order to ratify and be a party to the
3 convention against torture. That was part of the rule
4 the United Nations convention against torture said: If
5 you're going join and have this be applicable, you have
6 to pass a statute under your domestic code that
7 criminalizes torture. That's what we did. We now have
8 that statute and that's why we are parties to the larger
9 convention, which provides for extradition to each
10 other. That's foreign policy. That's governments
11 negotiating with each other, Your Honor, to exchange
12 wanted prisoners, fugitives.

13 You put your finger on it when you asked Ms.
14 Spence, isn't ex post facto a constitutional protection.
15 The basis of it is in the United States Constitution,
16 doesn't apply. It's not that kind of proceeding. Now
17 you're right, there is a limitations period listed in
18 the treaty but the case law Oppenheim, Hilario, McMullen
19 all ignored by Basic, not distinguished. They didn't
20 distinguish these cases. Constitutional protections
21 such as ex post facto is not available, not applicable,
22 in an extradition context.

23 It's fine for a government now to say we're
24 going to go back and make it criminal and that's going
25 to allow other countries, because we are complying with

1 the convention of torture to extradite people for things
2 that weren't crimes under that statute at the time.
3 Again, even if you go back to DiMenna to a country that
4 didn't even exist at the time. That's part of the
5 reality that we are dealing with here, the limited
6 nature of this Court's inquiry. It's a matter of
7 foreign policy.

8 Now, let me move ahead to the 1993 document.
9 Ms. Spence makes the point that these arguments about
10 the validity of that in a comparison to the 1993
11 document to the American system were not made in Basic.
12 That's just inaccurate, Your Honor. We did actually
13 look at the docket sheet, and I would refer the Court to
14 docket entries 36, 37, and 43. Those are briefs filed
15 by the United States in which this very same analysis
16 comparing the '93 document to the American system with
17 particularity and the factual allegations was all put
18 forth before the Court. Now, the fact that the Court
19 doesn't go through that analysis as an opinion, is true,
20 but those arguments were, in fact, briefed to the Basic
21 Court. And we would ask the Court to look at those
22 specific docket entries.

23 Now, the Court did in Basic give a cite when
24 it came to interpretation of the '93 document. Unlike
25 this sort of general plain reading question of whether

1 or not you have to go back to '92. I'm referring the
2 Court specifically to page 16 of the opinion, at the
3 very bottom of the page.

4 It says: While charge initiation under
5 federal law requires an indictment or Information, the
6 BIH system plainly does not align with American
7 procedure. The jurisdiction to jurisdiction translation
8 calls for some kind of political gymnastics. The
9 question becomes whether BIH took an act to formally
10 initiate prosecution such that the Court can find
11 totally to occur during the limitation period. Then it
12 gives a cite and quotes the Cherry v. Reish case, 1996
13 case, from the Southern District of New York. In the
14 context of an extradition proceeding where a step is
15 taken in a foreign legal system to toll the statute of
16 limitations that step also tolls the limitation period
17 under US law.

18 So the Court in Basic in contrast to its
19 earlier ruling grounded its conclusion of the '93
20 document and how close it was and its analysis to it
21 cited authority from the Southern District. Again, Your
22 Honor, that is what the Court should do here. When you
23 have a Bosnian prosecutor's authoritative opinion that
24 this tolled the statute in Bosnia to the extent it
25 existed, you can't look beyond that. The statute of

1 limitations to compare it somehow to the American
2 system, a very different system from the civil law
3 system in Bosnia, we just can't engage in that. That
4 maybe something for the Secretary of State but not for
5 purposes of limited inquiry before this Court.
6 Authority in Basic for that is the Cherry v. Reish case.
7 It's just one of many cases which has held the foreign
8 government's representations of their own laws.

9 Now, Your Honor, just finally, the only
10 other thing I will say, Your Honor, and I don't have
11 anything to say on the political offense exception. I
12 think we have established it. This proportionality
13 argument that somehow it's okay. Their need to torture
14 them is crazy and is not the law. That's just civil --
15 torture of civilians regardless of the context of which
16 it occurs per se cannot be applicable. I would submit
17 on clear authority from the State Department and all the
18 cases which have so held.

19 But I will say going back to the statute of
20 limitations find, if we accept this argument that
21 somehow we can't extradite someone if an original
22 prosecution in the country where the fugitive is located
23 wasn't available, we create a very perverse place for
24 fugitives committing serious reprehensible acts in other
25 nations to come here, if there was not a crime existing

1 at that time or to go to any other country, if there was
2 a treaty with this particular statute of limitation
3 argument. All they have to do is go somewhere it wasn't
4 a crime.

5 THE COURT: That assumes a very smart
6 criminal who has researched International law.

7 MR. HEAPHY: But there are plenty of them,
8 Your Honor, who go places where they can't be extradited
9 because they could potentially not be extradited.
10 Again, International law says the countries can go back
11 and say it's okay to extradite for this because the
12 constitution doesn't apply. That is a sound policy and,
13 if we didn't have that, then it would allow people to
14 selectively choose where we locate and that would create
15 a policy that is unwise.

16 For all these reasons, statute of
17 limitations here doesn't apply. It's 2340A. The Court
18 should disagree with Basic and write a better more
19 reasoned opinion on this issue that would be consistent
20 with all of the others. And the political offense
21 argument, again, it's just inconsistent with law and the
22 Court should reject that issue and certify this to the
23 Secretary of State for extradition, unless they want to
24 submit a proposed order of certification. If the Court
25 wants, we have some templates from the Department -- I'm

1 not presuming how you rule. If you're interested in a
2 proposed order, we can submit one this week.

3 THE COURT: Let me get an opinion out. If I
4 find that's going to be necessary, I will do that.

5 First of all, again, I want to thank
6 everyone for relocating over here on fairly short notice
7 today. I appreciate the extremely good work that has
8 been done on behalf of both the Government as well as on
9 your behalf, Mr. Nezirovic, with respect to not only the
10 briefing but the argument and presentation of evidence.
11 It is very helpful. I hope to get an opinion out
12 quickly because it serves all persons interested to be
13 able to do that, and I will.

14 The last thing that I wanted to cover today
15 is I have been working on an opinion with respect to the
16 bond request on behalf of Mr. Nezirovic, and I'm going
17 issue that today. I am going give you my holding
18 brought out and the basis of it.

19 With respect to bond and an international
20 extradition, I do find that a person such as Mr.
21 Nezirovic must establish by clear and convincing
22 evidence both special circumstances and also a no risk
23 of flight. The evidence that was in front of the Court
24 in this regard is that -- the primary special
25 circumstance presented by Mr. Nezirovic was that coming

1 into the detention setting he suffered from post-
2 traumatic stress disorder. That that was aggravated as
3 a result of the detention setting that he was in, and he
4 was not receiving or had not received any treatment for
5 that while he was in the Western Virginia regional jail.

6 The evidence also was that Mr. Nezirovic was
7 receiving whatever medications had been prescribed to
8 him prior to being detained, and he continued to receive
9 that in the jail. Mr. Russell testified, at the Court's
10 request, he came over on short notice and testified to
11 the mental-health treatment that was available to Mr.
12 Nezirovic in the prison setting.

13 Based upon testimony, I did not find that
14 there was a special circumstance as to aggravation of
15 any post-traumatic stress. I also did not find that
16 there is any special circumstance as a result of the
17 length of these proceedings. In fact, as I have looked
18 at extradition proceedings, this one has gone about as
19 quickly as many of them or as any have. I do not take
20 into account what may or may not happen in the event
21 that I find Mr. Nezirovic extraditable. What may or may
22 not happen with respect to a pending habeas. I don't
23 know whether that will be filed. Whether the Secretary
24 of State will certify it, if I find Mr. Nezirovic
25 extraditable. I don't know what Court -- I know what

1 Court it will land in front of, but I don't know how
2 long it would take any judge to be able to deal with
3 that. So I'm not going to begin to guess.

4 Then the final finding that I make is that
5 I'm not going to rule one way or another whether there
6 is a substantial likelihood of success. The cases that
7 I have found that have done that primarily on the
8 probable cause issue. That there is simply not factual
9 probable cause that's set out in the extradition
10 documents. So that's not an issue in this case. This
11 is a case that's going to rise and fall on the legal
12 arguments that we just spent the last hour and a-half
13 discussing.

14 So I am going to deny the request for bond.
15 I will issue an order and opinion on that this
16 afternoon. You may receive it even before you get back
17 to Roanoke. I hope to have an opinion out very soon
18 thereafter so this can go wherever it's going to go.

19 Anything else we need to take up?

20 MR. HEAPHY: No thank you.

21 THE COURT: Ms. Spence, anything else?

22 MS. SPENCE: No, Your Honor.

23 THE COURT: All right. Very well. We'll
24 stand in recess.

25 (Proceeding concluded at 11:30 a.m.)

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CERTIFICATE OF COURT REPORTER

I, Janelle A. Mundy, Notary Public in and
for the Commonwealth of Virginia at Large, whose
commission expires July 31, 2016, certify that I
reported verbatim the proceedings in the United States
District Court for the Western District of Virginia, at
Roanoke, Virginia, in the captioned cause, heard by the
Honorable Robert S. Ballou, Magistrate Judge of said
court, on November 19, 2012.

I further certify that the foregoing
transcript, to the best of my abilities, constitutes a
true, accurate and complete transcript of said
proceedings.

Given under my hand and notarial seal on
this 11th day of October, 2013.

/s/ Janelle A. Mundy
Notary Public for the
Commonwealth of Virginia